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Cascades Containerboard Packaging—Niagara, A Division of Cascades Holding US Inc. and International Association of Machinists and Aerospace Workers, District Lodge 65, AFL–CIO. Cases 03–CA–242367, 03–CA–243854, and 03–CA–248951

May 6, 2021

NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN,
EMANUEL, AND RING

On February 9, 2021, the National Labor Relations Board issued a Decision and Order in this case, reported at 370 NLRB No. 76, affirming the administrative law judge’s conclusions that the Respondent violated the Act in several respects, including by unilaterally laying off unit employees for 2 weeks and by unilaterally and discriminatorily changing how it calculates payments to employees under its profit-sharing plan. To remedy those violations, we ordered the Respondent, among other things, to make whole the affected unit employees for the losses they suffered.

Additionally, at the General Counsel’s request, we adopted a new remedy, to be included in all pending and future cases (including the instant case) in which a respondent employer must make one or more employees whole, requiring the employer to file with the Regional Director a copy of each backpay recipient’s appropriate W-2 form(s). This is in addition to our customary remedy requiring respondent employers to submit backpay-allocation reports to the Regional Director, who then transmits the reports to the Social Security Administration (SSA) “at the appropriate time and in the appropriate manner.” *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76, slip op. at 3 (2021) (quoting *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324, 1324 (2016)).

The rationale for creating this new W-2 remedy is fully set forth in the *Cascades Containerboard* decision. Briefly, the General Counsel argued, and we agreed, that requiring employers to submit both W-2 forms and backpay-allocation reports to the Regional Director, who would ensure their mutual consistency before sending them to the SSA, would lead to more accurate calculation of Social Security benefits. *Cascades Containerboard Packaging—Niagara*, supra, slip op. at 2–3. The General Counsel did not request, and we did not impose, a deadline for furnishing the W-2 forms.

On March 2, 2021, the Acting General Counsel filed a Motion for Clarification and Modification of Order Requiring Submission of W-2 Forms, in which he asks us to impose a 21-day deadline for employers to submit W-2 forms to Regions. Specifically, he urges us to modify paragraph 2(f) of the *Cascades Containerboard* Order to read:

Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 3 a copy of each backpay recipient’s corresponding W-2 form(s) reflecting the backpay award.

Observing that the Board already imposes a 21-day deadline for filing backpay-allocation reports, the Acting General Counsel argues that there should be a corresponding 21-day deadline for the new W-2 remedy because backpay-allocation reports and W-2 forms are “companion documents.” The Acting General Counsel predicts that the absence of concurrent deadlines will lead to inaccuracies and delays, as well as the SSA’s continued rejection of backpay-allocation reports submitted by Regional Directors.

The Acting General Counsel acknowledges that employers may object to his proposed modification. For example, he observes that employers may argue that it is overly burdensome, if not impossible, for them to submit W-2 forms prior to the IRS’s mandatory reporting period. However, the Acting General Counsel disputes these posited arguments and states that on balance, the benefits of imposing a deadline outweigh any purported imposition on respondent employers.

Section 10(c) of the Act states that the Board shall order those found to have committed an unfair labor practice “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies” of the Act. Consistent with Section 10(c), the Board has long held, with Supreme Court approval, that the victims of unlawful conduct should be made whole for losses suffered as a result of an unfair labor practice. *NLRB v. J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 263 (1969) (“The legitimacy of back pay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute . . .”). To better accomplish this make-whole purpose, the Board in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), adopted a remedy requiring wrongdoing employers to file backpay-

allocation reports with the SSA.¹ When this arrangement proved problematic, the Board modified the remedy in *AdvoServ of New Jersey*, supra, to require backpay-allocation reports to be filed with the Regional Director, who would in turn file them with the SSA at the appropriate time. And in our prior decision in this case, in response to further problems reported by the SSA, we sought to better effectuate the policies of Section 10(c) by requiring employers additionally to file W-2 forms with the Regional Director. We adhere to these remedies, but we seek input regarding when employers should file backpay-allocation reports and W-2 forms.

The question presented by the Acting General Counsel's motion is whether the Board should impose a deadline for the filing of W-2 forms and, if so, what that deadline should be. The Acting General Counsel proposes a 21-day deadline. He acknowledges that this deadline may impose a burden on employers by requiring them to generate W-2 forms sooner than would be required by Social Security and tax laws, but the motion does not assess the extent of that burden or address alternatives that might mitigate it.² In addition to the concerns posited and dismissed by the Acting General Counsel, we note that his proposed deadline would result in employers potentially generating one W-2 during Year One for the purpose of the Board's remedy, and—for employees who remain employed by the respondent—a second W-2 in January of Year Two covering Year One in its entirety.³

Moreover, Section 10557 of the Board's Compliance Manual states that Regions will hold backpay-allocation reports and deliver them to the SSA in April of the year *after* the Region receives such reports, to ensure that the reports are delivered to the SSA at one time and to alleviate the burden on the Regions. Thus, it appears that backpay-allocation reports, which under *AdvoServ* must be filed by employers within 21 days of the date the amount of backpay is fixed, may be sitting in regional offices for months—indeed, possibly even a year or more—before they are transmitted to the SSA. Under these circumstances, it is unclear *both* why Regions would need the corresponding W-2 forms within 21 days after the date the amount of backpay is fixed *and* whether we should continue to require employers to file backpay-allocation

reports within the existing 21-day deadline. We believe both matters warrant further consideration.

To aid in the consideration of these issues, the Board now invites the filing of briefs in order to afford the parties and interested amici the opportunity to address the following questions.

1. Should the Board impose a deadline within which a respondent employer must furnish to a Regional Director a copy of each backpay recipient's appropriate W-2 form(s), reflecting the backpay award? If so, what should the deadline be?

2. Should the Board modify the 21-day deadline, set forth in *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), for submission of a report allocating the backpay award to the appropriate calendar year for each affected employee? If so, what modification would be appropriate?

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before June 7, 2021. The parties may file responsive briefs on or before June 22, 2021, which shall not exceed 15 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically by going to www.nlr.gov and clicking on "eFiling." The parties and amici are reminded to serve all case participants. A list of case participants may be found at <https://www.nlr.gov/case/03-CA-242367>. If assistance is needed in E-Filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Executive Secretary Roxanne L. Rothschild at 202-273-2917.

Dated, Washington, D.C. May 6, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

¹ The backpay-allocation report remedy was first adopted in *Latino Express, Inc.*, 359 NLRB 518 (2012), but that decision was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

² For example, another approach would be to link the deadline to the statutory due date for submission of W-2 forms. See 26 U.S.C. § 6071 ("Forms W-2 and W-3 and any returns or statements required by the Secretary to report nonemployee compensation shall be filed on or before January 31 of the year following the calendar year to which such returns relate."); [https://www.ssa.gov/employer/filingDeadlines.htm#:~:text=January%2031st%20is%20the%20deadline%20to%20distribute%20Forms,2%20to%20employee\(s\).](https://www.ssa.gov/employer/filingDeadlines.htm#:~:text=January%2031st%20is%20the%20deadline%20to%20distribute%20Forms,2%20to%20employee(s).) ("January 31st is the deadline to distribute Forms W-2 to employee(s).") (last visited April 16, 2021).

³ The Acting General Counsel states that "continued employment with the Respondent would certainly qualify as a reason for the Regional Director to provide Respondent with additional time to submit the W-2." We believe the better practice is to account for this circumstance in the deadline itself if it is possible to do so. Accordingly, we decline to adopt this approach absent further justification.

William J. Emanuel, Member

John F. Ring, Member

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